K SUBARAM & ORS

v.

THE JENDARATA-BERNAM PROVIDENT FUND & ORS

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-02-641-96]
15 SEPTEMBER 2003

LABOUR LAW: *Provident Fund - Dismissed employee - Employee's principal sum in Fund - Interest credited after date of dismissal pending decision of Industrial Court - Dismissal upheld by Industrial Court - Whether employee entitled to said interest - Whether employee only entitled to principal sum as at date of dismissal*

The appellants herein were employees of United Plantations Berhad ('the company') and were members of a Fund called the Jendarata-Bernam Provident Fund ('the Fund') by virtue of being employees thereof. The company dismissed the appellants on 29 March 1979 as they failed to heed the company's call to return to work from an illegal strike. Since that date, the company did not contribute to the Fund in respect of any of the appellants. When the appellants' dismissal was referred to the Industrial Court, the respondents who managed the Fund continued to credit provisional interests on the principal sums in the Fund that stood at the appellants' credit as at 29 March 1979. This act was done to cover the possibility that the appellants might be reinstated by the Industrial Court and as such would be entitled to the said interests. The Industrial Court, however, in an award dated 8 June 1983 upheld their dismissal. The High Court and the then Supreme Court affirmed the Industrial Court's decision on 25 July 1985 and 25 March 1987 respectively. On 1 July 1983, pursuant to the Industrial Court's award, the respondents remitted to the Employees Provident Fund ('EPF') the principal sums in the Fund that stood at the appellants' credit as at 29 March 1979. On 22 December 1983, the respondents remitted to the EPF, *inter alia*, the interest on the principal sums for the period between 29 March 1979 and 30 June 1983 calculated at the rates declared by the EPF in the respective years. The appellants then applied to the High Court on the ground that the respondents failed to remit to EPF the entire sums due to them with interest that was credited beyond 29 March 1979. The High Court dismissed their application. Hence, this appeal.

Held:

Per Alauddin Mohd Sheriff JCA

[1] The effect of r. 14 of the Rules of the Fund ('the Rules') is that if a member ceases employment with the company, the sum standing to the credit of the member as at the date of such cessation of employment must be remitted to the EPF. The said rule does not provide for entitlement to dividends or interest declared by the Fund for the period between the cessation of employment and remittance of the monies to the EPF. (pp 735 f & 736 b)

[2] In view of the pending dispute over the appellants' dismissals before the Industrial Court, it was proper for the respondents to set aside provisional sums to cater for the possibility that the appellants might be reinstated by the Industrial Court. Since the dismissal of the appellants was upheld by the Industrial Court, the appellants were not entitled to any monies other than what was standing to their credit as at 29 March 1979. The provisional sums could not amount to an admission of the amounts due to the appellants. (p 736 g-h)

[3] Although the case of the appellants' dismissals was pending before the Industrial Court, that did not have the effect of suspending their dismissals until the date of the Industrial Court's decision. The dismissal would still take effect from the original date unless the Industrial Court ordered reinstatement. (p 737 a)

[4] The respondents had fully complied with the Rules in respect of the benefits due to the appellants under the Fund and in the remittance of the benefits to the EPF. It would be against all principles of equity and good conscience to allow the appellants to enjoy the fruits of the Fund after they had ceased employment by reason of their participation in an illegal strike. (p 738 a-b)

[5] The effect of the appellants' application would be to deprive the existing members of the Fund of the amount sought by the appellants. Under r. 11 read with rr. 6 to 10 of the Rules, each member is credited with a proportion of the amount in the books of the Fund. Payments to the appellants for the period beyond 29 March 1979 would not only deprive the existing members of the money available in the Fund but also reduce the proportion to which they would be entitled. It followed that in the face of the clear intention of r. 14 of the Rules, the appellants were

not entitled to the dividends or interests declared by the Fund for the period between cessation of employment and remittance of the monies to the EPF. (p 738 c-e)

Per Abdul Aziz Mohamad JCA

[1] The respondents remitted to the EPF Board all that they were obliged to do by r. 14 of the Rules. Nothing more was due in respect of each of the appellants from the respondents. The amounts shown as standing to the appellants' credit as at 31 December 1982 on which they based their claim consisted of the principle sum standing to their credit as at 29 March 1979 and provisional interest thereon from that date until 31 December 1982. Had the dispute in the Industrial Court resulted in their being reinstated, the appellants would have been entitled to the provisional interest. As they were not reinstated and ceased employment with the company on 29 March 1979, they were not entitled to the provisional interest. They were only entitled at most to the interest that the Fund remitted to the EPF on 22 December 1983. (p 742 e-g)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu dalam kes ini adalah pekerja-pekerja sebuah syarikat United Plantations Berhad ('syarikat tersebut') dan merupakan ahli-ahli sebuah tabung pekerja syarikat berkenaan yang bernama Jendarata-Bernam Provident Fund ('tabung tersebut'). Perayu-perayu dibuang kerja oleh syarikat tersebut pada 29 March 1979 apabila mereka gagal mematuhi arahan untuk balik kerja dari pemogokan pekerja yang tidak sah. Selepas tarikh tersebut, tiada sumbangan yang dibuat ke dalam tabung tersebut bagi pihak perayu-perayu. Apabila pembuangan kerja perayu-perayu dirujuk kepada Mahkamah Perusahaan, responden-responden yang mengendalikan tabung tersebut kreditkan faedah ke atas jumlah wang prinsipal perayu-perayu dalam tabung tersebut yang terdiri pada 29 March 1979. Tindakan itu dibuat untuk mengambil kira kemungkinan bahawa jika perayu-perayu dikembalikan kerja di syarikat tersebut, maka mereka akan berhak mendapat faedah tersebut. Di dalam satu award bertarikh 8 Jun 1983, Mahkamah Perusahaan mengesahkan pembuangan kerja perayu-perayu oleh syarikat tersebut. Mahkamah Tinggi dan Mahkamah Agung pada masa itu juga mengesahkan keputusan Mahkamah Perusahaan tersebut pada 25 Julai 1985 dan 25 March 1987 masing-masing. Pada 1 Julai 1983 berikutan award Mahkamah

Perusahaan, responden-responden telah meremitkan kepada KWSP jumlah wang prinsipal perayu-perayu dalam tabung tersebut setakat 29 March 1979. Pada 22 Disember 1983 pula, responden-responden meremitkan kepada Kumpulan Wang Simpanan Pekerja ('KWSP'), *inter alia*, faedah atas jumlah wang prinsipal bagi jangka masa di antara 29 March 1979 dan 30 Jun 1983. Faedah tersebut dikirakan mengikut kadar yang diisytiharkan oleh KWSP pada tahun-tahun berkenaan. Perayu-perayu kemudiannya memohon kepada Mahkamah Tinggi atas alasan bahawa responden-responden gagal untuk meremitkan kepada KWSP jumlah wang sepenuhnya termasuk faedah yang dikreditkan selepas 29 March 1979. Mahkamah Tinggi menolak permohonan tersebut. Maka rayuan ini.

Diputuskan:
Oleh Alauddin Mohd Sheriff HMR

[1] Menurut k. 14 Kaedah-Kaedah Tabung ('Kaedah-Kaedah tersebut'), jika seseorang ahli berhenti kerja daripada syarikat tersebut, jumlah wang yang ada di dalam kredit ahli tersebut pada masa ia berhenti kerja mesti diremitkan kepada KWSP. Kaedah tersebut tidak menetapkan bahawa ahli berhak untuk dividen atau faedah yang diisytiharkan oleh tabung tersebut dalam jangka masa di antara tarikh berhenti kerja dan tarikh remitan wang kepada KWSP.

[2] Memandangkan kes pembuangan kerja perayu-perayu di hadapan Mahkamah Perusahaan, ianya adalah sesuai untuk responden-responden mengetepikan jumlah wang sementara bagi kemungkinan perayu-perayu akan di kembalikan kerja oleh Mahkamah Perusahaan. Disebabkan pembuangan kerja perayu-perayu disahkan oleh Mahkamah Perusahaan, maka perayu-perayu tidak berhak untuk mendapatkan apa-apa jumlah wang melainkan jumlah yang ada dalam tabung tersebut pada 29 March 1979. Jumlah wang yang diketepikan selepas 29 March 1979 bukan satu pengakuan bahawa ianya hak perayu-perayu.

[3] Walaupun kes pembuangan kerja perayu-perayu menunggu keputusan Mahkamah Perusahaan, ianya tidak bermakna bahawa pembuangan kerja mereka digantung sehingga tarikh keputusan Mahkamah Perusahaan.

[4] Responden-responden telah mematuhi Kaedah-Kaedah tersebut berkenaan faedah-faedah yang patut diterima perayu-perayu di bawah tabung tersebut dan dalam remitan faedah-faedah tersebut kepada KWSP. Ianya akan bertentangan semua prinsip ekuiti dan kesedaran batin yang baik jika perayu-perayu dibenarkan menikmati keuntungan tabung tersebut selepas mereka diberhentikan kerja disebabkan mengambil bahagian di dalam pemogokan pekerja yang tidak sah.

[5] Permohonan perayu-perayu, jika dibenarkan, akan melucutkan ahli-ahli lain daripada faedah-faedah tabung tersebut. Di bawah k. 11 dibaca dengan kk. 6 hingga 10 Kaedah-Kaedah tersebut, setiap ahli akan dikreditkan dengan bahagian mereka mengikut jumlah yang dicatat di dalam buku-buku tabung tersebut. Pembayaran kepada perayu-perayu selepas 29 March 1979 bukan sahaja akan merampas ahli-ahli lain daripada wang yang ada dalam tabung tersebut malah ianya juga akan mengurangkan bahagian yang mereka berhak untuk menerima. Dengan itu, memandangkan kehendak jelas k. 14 Kaedah-Kaedah tersebut, perayu-perayu tidak berhak menerima dividen-dividen atau faedah-faedah yang diisytiharkan oleh tabung tersebut dalam jangka masa di antara tarikh berhenti kerja mereka dan tarikh remitan wang kepada KWSP.

Oleh Abdul Aziz Mohamad HMR

[1] Tiada apa lagi yang sepatutnya diterima oleh perayu-perayu daripada responden-responden kerana responden-responden telah pun meremitkan ke KWSP semua yang sepatutnya mereka remitkan mengikut k. 14 Kaedah-Kaedah. Jumlah wang dalam kredit perayu-perayu pada 31 Disember 1982 terdiri dari jumlah wang prinsipal yang terdiri pada 29 March 1979 dan faedah sementara yang dikreditkan dari tarikh tersebut hingga 31 Disember 1982. Jika pertikaian di hadapan Mahkamah Perusahaan mengakibatkan perayu-perayu dikembalikan kerja, maka mereka berhak mendapatkan faedah sementara tersebut. Oleh kerana mereka tidak dikembalikan kerja dan berhenti bekerja dengan syarikat tersebut pada 29 March 1979, maka mereka tidak berhak untuk mendapatkannya. Sebanyak-banyaknya mereka hanya berhak untuk mendapat faedah yang diremitkan kepada KWSP pada 22 Disember 1983.

Rayuan ditolak.]

Case(s) referred to:

Abu Habidah Yaacob v. Pengarah Jabatan Perusahaan Johor Bahru [1990] 2 CLJ 388; [1990] 1 CLJ (Rep) 559 HC ***(refd)***

Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 SC ***(refd)***

Lim Yee Cheong v. Hj Mokty Datuk Mahmood & Ors [1984] 2 MLJ 308 ***(refd)***

Sainsbury Ltd v. Savage [1981] 1 CRI ***(refd)***

United Temiang (FMS) Rubber Estates Ltd v. Perumal [1973] 1 MLJ 209 ***(refd)***

West Midlands Co-operative Society Ltd v. Tipton [1986] 1 All ER 513 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 26(2)
Limitation Act 1953, ss. 6(1), 22(2)

For the appellants - M Manoharan (R Kengadharan); M/s R Kengadharan & Co

For the respondents - N Sivabalah (S Suganthi); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Originating Notice No: R8-25-145-1989]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:
I have the opportunity of reading the judgments of my learned brothers, Alauddin bin Dato' Mohd Sheriff and Abdul Aziz bin Mohamad JJCA. I agree with what have been expressed by them in those judgments and have nothing further to add.

The appeal is hereby dismissed.

Alauddin Mohd Sheriff JCA:
This is an appeal against the decision of the High Court, Kuala Lumpur handed down on 2 October 1996 dismissing the appellants' application for a declaration that on the true construction of the Rules of the Jendarata-Bernam Provident Fund ("the Fund") and in the events which had occurred, the respondents were in breach of the Rules of the Fund ("the Rules") by failing to remit to the Employees Provident Fund ("EPF") the entire sums standing to the credit of the appellants and the dividends/interest due to the appellants since 1 January 1980.

Factual Background
The appellants were employees of United Plantations Berhad ("the company") and were members of the Fund. Contributions and payment of benefits are governed by the Rules.

The appellants ceased employment with the company with effect from 29 March 1979 by reason of their participation in an illegal strike. Thereafter, no contributions were made to the Fund in respect of any of the appellants.

The appellants through their representative the All Malayan Estates Staff Union made a representation under s. 26(2) of the Industrial Relations Act 1967 to the Industrial Court.

In Award No. 111 of 1983 dated 8 June 1983, the Industrial Court held that the appellants had abandoned their employment as from 29 March 1979. On 25 July 1985 the High Court and on 25 March 1987 the then Supreme Court respectively affirmed the Industrial Court's decision.

Pursuant to the Industrial Court's Award No. 111 of 1983, the principal amount standing to the credit of the appellants in the Fund as at 29 March 1979 was remitted to the EPF Board on 1 July 1983.

On 22 December 1983, the respondents remitted to the EPF, *inter alia*, the interest on the principal sum for the period from 29 March 1979 to 30 June 1983 calculated at the rates declared by the EPF in the respective years.

The Appellants' Submission

Before us, it was admitted on behalf of the appellants that in so far as their dismissal is concerned they have no further recourse as it had been determined with finality. Their intention in the present appeal, to put it in a very simple form, is to request this court to declare a right vested in the appellants by the Rules, in particular rr. 14, 16, 17, 20, 24 and 26. It is their submission that the right involved is their right to the monies standing to their credit with the Fund with accruals thereto by way of interests, dividend etc, following their ceasing to be employees of the company and in consequence ceasing to be members of the Fund.

It was further contended on behalf of the appellants that although they have been dismissed from the company, it (the company) still owes them an obligation to either cause the monies to be credited in their favour with the EPF Board or return the monies standing to their credit in the Fund at the time of their dismissal to them. The dismissal of the appellants as employees of the company is not an event that will bring about the termination of the Fund under r. 24. They say that the monies standing to their credit in the Fund are monies belonging to them and will continue to be so notwithstanding their dismissal from the company. The provisions of the Rules enure for the benefit of the appellants. In other words, notwithstanding the dismissal of the appellants the Fund will continue and in consequence the rights of the appellants *vis-a-vis* the Fund will remain preserved.

Such a preservation of the Fund notwithstanding the dismissal of the appellants will then necessarily have to mean that the amounts standing to the credit of the appellants at the point in time when they ceased to be employees of the company will be 100% the appellants' entitlement. It is the appellants' monies derived by them by virtue of the Rules. It is their contractual right to the said monies (see r. 20). The said monies never belonged to the Fund.

If the Fund is allowed to retain the monies standing to the credit of the appellants or any part thereof then it would mean permitting the Fund to resile from its contractual obligation and in this case more specifically the company's contractual obligation to refund every cent of the monies standing to the credit of the members including the present appellants till the last cent.

Respondent's Submission

The first point taken by learned counsel for the respondent in his submission before us is that the appellants' action was time-barred by virtue of s. 6(1) and 22(2) of the Limitation Act 1953. The alleged cause of action arose on 29 March 1979. The appellants' action was commenced only on 30 December 1989, which was beyond the six years limitation period. In any event, the appellants have been guilty of undue delay in commencing the action ten years after the alleged cause of action arose.

Rule 14 of the Fund provides that if a member ceases employment with the company, the sum standing to the credit of the member as at the date of such cessation of employment must be remitted to the EPF. In the present instance, the capital amount which was standing to the appellants' credit as at 29 March 1979 was transferred to the EPF on 1 July 1983. Under r. 14 there is no provision for entitlement to dividends or interest declared by the Fund for the period between the appellants' cessation of employment and remittance of the monies to the EPF.

The appellants were never entitled to the amounts being claimed by them. These were sums which may have only been payable to them if the Industrial Court had ordered their reinstatement. In view of the dismissal of the appellants' claim in Award No. 111 of 1983 and the subsequent dismissal of the application for judicial review, they were not entitled to the aforesaid sums.

The appellants' application if successful would in effect deprive the existing members of the Fund of their respective proportion of the amount in the books of the Fund. This is premised on an interpretation of r. 11 read together with rr. 6 to 10.

Court's Findings

It must first be emphasised here that the appellants' application before the High Court was solely supported by the affidavit filed by the first appellant. Therefore in order to get a better perspective of the said application which is the subject matter of this appeal, I shall first refer to the affidavit of K. Subaram, the first appellant, dated 30 December 1989 (in support of the application) (see p. 29 and 30 A/R).

The affidavit reads as follows:

> 12. Subsequent to the Industrial Court handing down its Award on 8th June, 1983, the Company informed me *vide* a letter dated the 31st day of December, 1983 that the principal sum standing to my credit as at the date of my dismissal had been remitted to the Employees Provident Fund. I was further informed that the Company was also remitting the interest calculated at the interest rate I would have received from the Employees Provident Fund if the money has been remitted in 1979. Now produced and shown to me and marked as "KS3" is a copy of the letter from the Company dated 31st day of December, 1983.
>
> 13. The Company had earlier informed me *vide* a statement dated the 31st day of December, 1982, that the principal sum standing to my credit was RM197,342.76. A copy of the said statement is now produced and shown to me and marked as "KS4".
>
> 14. In breach of the Rules of the Fund which forms the basis of the contract between the Applicants and the Respondent, the Respondent failed to remit the full sum standing to my credit in the Fund.
>
> 15. Although the Respondent had kept the monies standing to my credit from 1979 till 1983, it failed to remit to the Employees Provident Fund the full dividends declared ...
>
> 16. On my instruction, my solicitors wrote to the Respondent's solicitors seeking an explanation for failing to remit the balance sum of RM148,720.42 ...

17. I am advised by my solicitors and verily believe that I am entitled to the full sum standing to my credit as at the date of Award 113/83 and all dividends earned from 1979 till to date under the Rules of the Respondent.

In his affidavit in reply to the first appellants' affidavit (see pp. 32-41 A/R), the third respondent deposed as follows:

17.1 Paragraph 13 of Subaram's affidavit is denied. I aver that in view of the pending trade dispute between the Company and the Union in Industrial Court Case No. 129 of 1979, the Respondents computed a provisional sum to cover the eventuality that an order of reinstatement may be made in favour of the employees. It was in that connection that the said statement of account, Exhibit "KS4", was prepared.

17.2 I aver that the said sum of RM197,342.76 was derived on the basis of the interest rates declared by the Respondents in the relevant years pending the outcome of the Industrial Court case, the principal sum being RM33,113.72 and the interest being RM164,229.04. As the Industrial Court in Award 111/83 upheld the said K. Subaram's dismissal, he did not have any entitlement (under the Rules of the Fund) to the said interest of RM164,229.04.

18. I aver that the Respondents have at all material times acted in accordance with the Rules of the Fund in that when the Applicants' dismissal was upheld by the Industrial Court in the said Award, the Respondents not only remitted to the EPF the monies due to the Applicants as at 29 March 1979 calculated in accordance with the provisions set out in Rule 14 above, but in addition the interest on the principal sum calculated at the rates declared by the EPF for the relevant years for the period from 29th March, 1979 to 8th June 1983.

From the above affidavits it is apparent to me that what the first appellant is saying is that he is entitled not only to the principal sum of RM33,113.72 but also to the interest amounting to RM164,229.04. In other words he is entitled to the full sum of RM197,342.76. The respondents on the other hand have explained how the figure of RM197,342.76 was arrived at. According to them the sum of RM197,342.76 was derived on the basis of the interest rates declared by them in the relevant years pending the outcome of the Industrial Court case, the principal sum being RM33,113.72 and the interest being RM164,229.04. According to the respondent the said sum of RM197,342.76 was computed as a provisional sum to cover the eventuality

that an order of reinstatement may be made in favour of the employees. Since the Industrial Court upheld the first appellant's dismissal, he is not entitled to the said interest of RM164,229.04 in accordance with the Rules.

Rule 14 provides:

> If a Member being an employee or not under the age of 55 years but not a person more particularly described in Rule 13 of these rules shall cease, save by reason of death to be in the employ of the company and in every such case the Trustees shall pay over to the Employees Provident Fund Board:
>
> (a) The full amount standing to the credit of such Member together with any interest that may have accrued thereon as at 31st day of December preceding the date of his ceasing to be in the employ of the Company as aforesaid: and
>
> (b) Such sum as shall have been contributed by the Member through deductions from his Remuneration from the said 31st day of December preceding the dates of his ceasing to be in the employ of the Company plus an equivalent sum in respect of contributions for the said period made by the company; and
>
> (c) Interest at the last declared rate to be not less than two and one half (2 1/2) percent per annum to be computed from the 31st day of December until the date of his ceasing to be so employed such interest to be assessed upon the aggregate of the monies more particularly described in sub-clauses (a) and (b) of this Rule.

In summary, the effect of r. 14 above would be that if a member ceases employment with the company, the sum standing to the credit of the member as at the date of such cessation of employment must be remitted to the EPF. In the instant appeal the appellant abandoned their services with the company and such abandonment of services can be construed as the cessation of employment (see *United Temiang (FMS) Rubber Estates Ltd. v. Perumal* [1973] 1 MLJ 209).

When the appellants abandoned their services with the company as of 29 March 1979, they ceased to be in the employment of the company. In the light of the decision of the Industrial Court upholding the dismissals of the appellants which was upheld by both the High Court and the then Supreme Court, this point can no longer be disputed or reopened.

I agree with the submission of learned counsel for the appellants that the Rules form the basis of the contract between the members and the respondents. However, it is my considered view that upon the true construction of r. 14, it does not provide for entitlement to dividends or interest declared by the Fund for the period between cessation of employment and remittance of the monies to the EPF.

Now, under these circumstances what would then be the actual sum that the first appellant is entitled to under the Rules? Paragraph 19 of the third respondent's affidavit appearing at p. 40 of the Appeal Record provides the answer to the above question. From the breakdown shown the amount he is entitled to is RM35,086.94. This figure is arrived at by adding the amounts due under r. 14(a), (b) and (c).

The learned judge in his judgment appearing at p. 16 of the Appeal Record took into consideration the abovementioned affidavits and made his finding as follows:

> Daripada penjelasan yang telah diberikan oleh Responden melalui Affidavit (kandungan 11 dan 15) tersebut, adalah jelas bahawa terdapat salah faham di pihak Pemohon-Pemohon mengenai jumlah sebenarnya wang kepunyaan mereka. Hak Pemohon untuk mendapat caruman KWSP hanya timbul jika mereka masih bekerja sebagai "employee" dengan Responden di mana Pemohon dibayar gaji. Apabila Pemohon dibuang kerja mereka tidak berhak dibayar gaji dari tarikh mereka dibuang kerja dan dari tarikh itu juga mereka tidak berhak untuk menerima caruman KWSPnya. Wang yang dituntut itu adalah wang yang terkumpul pada jangkamasa Pemohon-Pemohon telah dibuang kerja iaitu sejak 29 March 1979. Seperti yang dijelaskan oleh Affidavit Responden jumlah itu cuma 'provisional sum to cover the eventuality that an order of reinstatement, may be made in favour of the employees'.

With respect, I find there is nothing wrong with the learned judge's finding.

In view of the pending dispute over the appellants' dismissals before the Industrial Court, it was proper for the respondents to set aside provisional sums to cater for the possibility that the appellants may be reinstated by the Industrial Court. (See *Lim Yee Cheong v. Haji Mokty bin Datuk Mahmood & Ors* [1984] 2 MLJ 308). Since the dismissal of the appellants was upheld by the Industrial Court, the appellants were not entitled to any monies other than what was standing to their credit as at 29 March 1979. In my opinion, it would be preposterous to suggest that the provisional sums could amount to an admission of the amounts due to the appellants.

Although the appellants' dismissals were pending before the Industrial Court it does not have the effect of suspending it until the date of the Industrial Court's decision. The dismissal would still take effect from the original date unless the Industrial Court orders reinstatement. Support for this proposition can be found in the case of *West Midlands Co-operative Society Ltd. v. Tipton* [1986] 1 All ER 513 where Lord Bridge of Harwich referred to the following passage from the judgment of the Employment Appeal Tribunal ([1979] ICR 96 at 102) which was quoted with approval by Brightman LJ in *Sainsbury Ltd v. Savage* [1981] 1 CRI (p. 105 AR, bottom):

> In our view, when a notice of immediate dismissal is given, the dismissal takes immediate effect. The provisions of this contract as to the appeal procedure continue to apply. If an appeal is entered, then the dismissed employee is to be treated as being "suspended" without pay during the determination of his appeal, in the sense that if the appeal is successful then he is reinstated and he will receive full back pay for the period of the suspension. If the appeal is not successful and it is decided that the original decision of instant dismissal was right and is affirmed, then the dismissal takes effect on the original date. In our view, that is the date on which the termination takes effect for the purposes of the Act.

The same principle was followed in the case of *Abu Habidah bin Yaacob v. Pengarah Jabatan Perusahaan Johor Bahru* [1990] 2 CLJ 388; [1990] 1 CLJ (Rep) 559.

Similarly in *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor* [1988] 1 CLJ 1; ([1988] 1 CLJ (Rep) 39), one of the issues which arose for consideration in the then Supreme Court was whether the Industrial Court or the High Court had jurisdiction to amend the date of dismissal of the workman so that the workman is deemed to be in employment until the date of the award and thereby becomes entitled to back wages.

Wan Suleiman SCJ (as he then was) at p. 7 (p. 46) of his judgment had this to say:

> Accordingly, we hold that the workman was lawfully dismissed as was held by the Industrial Court. However, neither that court nor the High Court was correct in amending the date of dismissal and in awarding compensation as a consequence of such amended date, both matters outside their jurisdiction in an inquiry under section 20(3) of the Industrial Relations Act.

I must say, with the greatest of respect to the appellants that the respondents have fully complied with the Rules in respect of the benefits due to the appellants under the Fund and in the remittance of the benefits to the EPF.

In my judgment it would be against all principles of equity and good conscience to allow the appellants to enjoy the fruits of the Fund after they had ceased employment by reason of their participation in an illegal strike.

It must also be stressed that the effect of the appellants application would be to deprive the existing members of the Fund of the amount sought by the appellants. It must be observed that under r. 11 read with rr. 6 to 10, each member is to be credited with a proportion of the amount in the books of the Fund. Payments to the appellants for the period beyond 29 March 1979 would not only deprive the existing members of the money available in the Fund but also reduce the proportion to which they would be entitled to.

Learned counsel for the appellants in his written submission has completely omitted to show that the amounts to which the appellants were entitled would be only those amounts existing at the date of cessation of employment ie, 29 March 1979 and does not include interests or dividends. In the face of the clear intention expressed in r. 14 the appellants are not entitled to the dividends or interest declared by the Fund for the period between cessation of employment and remittance of the monies to the EPF.

As I find that this issue alone can finally dispose of this appeal I do not propose to address the other issues raised by the respondents.

For the reasons I have already mentioned above I find that there are no merits in this appeal before us. This appeal is hereby dismissed with costs. The order of the learned judge is confirmed. The deposit will go to the respondents towards account of taxed costs.

Abdul Aziz Mohamad JCA:

By virtue of being employees of United Plantations Berhad ("the company"), the appellants became members of, and made contributions to, the Jendarata-Bernam Provident Fund ("the Fund"), an approved Fund under the Employees Provident Fund Ordinance 1951. It was common ground that they ceased to be in the employ of the company on 29 March 1979 as a result of the company's decision terming them as having abandoned their contracts of employment for their failure to heed the company's call to return to work from an illegal strike. Their union challenged the company's decision in the Industrial Court, which on 8 June 1983 upheld the decision. Their union's

application for *certiorari* to the High Court was dismissed on 25 July 1983 and their union's appeal to the Federal Court was dismissed on 25 March 1987.

Their subsequent application to the High Court the dismissal of which led to the appeal before us, which application was made by notice of motion in December 1990, concerned what happened, after they ceased to be in the employ of the company on 29 March 1979, to the moneys that they were entitled to in the Fund. The question was governed by r. 14 of the Rules of the Fund, which required the Trustees of the Fund, in the event that a member of the Fund ceased, save by reason of death, to be in the employ of the company, to "pay over" to the Employees Provident Fund Board, that is, the Board established under the 1951 Ordinance, the following:

> (a) The full amount standing to the credit of such Member together with any interest that may have accrued thereon as at the 31st day of December preceding the date of his ceasing to be in the employ of the Company as aforesaid; and
>
> (b) such sum as shall have been contributed by the Member through deductions from his Remuneration from the said 31st day of December preceding the date of his ceasing to be in the employ of the Company plus an equivalent sum in respect of contributions for the said period made by the Company; and
>
> (c) interest at the last declared rate to be not less than two and one half (2 1/2) per cent per annum to be computed from the 31st day of December until the date of his ceasing to be so employed such interest to be assessed upon the aggregate of the monies more particularly described in sub-clauses (a) and (b) of this Rule.

Those are paragraphs – "sub-clauses" according to para. (c) – of r. 14.

The steps that the respondents, as Trustees of the Fund, took to comply with r. 14 were explained by them in their two affidavits. The steps were facts that were not challenged by the appellants. Before rehearsing those steps, I need to explain that the appellants' application was supported by the affidavit of the first appellant ("Subaram"), who affirmed it on behalf of the others, but who set out the factual basis for the application by reference only to his own case. As a result, the respondents, in giving their explanation in respect of the appellants, especially in their first affidavit, gave focus to the case of Subaram. It was, however, evident from the respondents' two affidavits that the steps taken in respect of Subaram were

equally taken in respect of the other appellants, the difference between the appellants being only in the various figures in respect of each of them. The facts that follow, therefore, will highlight the case of Subaram.

Paragraph (a) of r. 14 concerned the amount standing to the credit of Subaram as at 31 December 1978, that date being 31 December preceding the date of his ceasing to be in the employ of the company. The amount was RM32,094.52 (p. 174 Appeal Record ("AR")). Paragraph (b) concerned contributions made by Subaram and the company in the period from 31 December 1978, which must be until 29 March 1979, when he ceased to be in the employ of the company, because there could have been no contributions – and in fact there were none – after that date. These amounted to RM1,019.20 (which included RM540, being what was termed "final commission") (p. 175 AR). The sums under paras. (a) and (b) therefore totalled RM33,113.72. This total was remitted to the EPF Board on 1 July 1983, after the Industrial Court upheld the company's decision (pp. 182 and 197 AR), as was the total for each of the other appellants. In the case, however, of the fourth appellant, Periasamy, the amount remitted to the EPF Board on 1 July 1983, (RM16,316.94) was less than the total under paras. (a) and (b) as at 29 March 1979 (RM116,659.38) because on 17 July 1982 he had withdrawn a portion (RM100,342.44) from the Fund.

Paragraph (c) concerned interest from the Fund on the sums under paras. (a) and (b), which sums totalled RM33,113.72, from 31 December 1978 until 29 March 1979, when Subaram ceased to be employed by the company, a period of almost three months. The interest on that total for the whole of 1979 would have been RM7,542.20 (p. 175 AR), but the figure that the respondents gave for interest on that total from 31 December 1978 up to 29 March 1979 only was RM1.973.22, and this was not challenged. As will be seen shortly, the respondents did remit that interest amount, and the amounts in respect of the other appellants, to the EPF Board. They had therefore complied with r. 14 to the letter, and there was nothing else under r. 14 that they had to comply with. All moneys in respect of Subaram that they had to remit to the EPF Board had been remitted, as was also the case with moneys in respect of the other appellants.

The respondents, however, as will have been noticed, paid the sum of RM33,113.72 falling under paras. (a) and (b) to the EPF Board only 1 July 1983 whereas the interest due from the Fund on that sum under para. (c) that the respondents were bound to remit, and did remit, to the EPF Board was only interest up to 29 March 1979. From 1 July 1983, when the respondents remitted the sum of RM33,113.72 to the EPF Board, that

sum would have enjoyed EPF interest. If that sum had been remitted on 29 March 1979 itself, the date when Subaram ceased to be in the employ of the company, that sum would have enjoyed EPF interest from that date. Because of the delay in remitting, that sum would not, unless something was done, be enjoying any interest, neither Fund interest nor EPF interest, for the period from 29 March 1979 to 1 July 1983. The delay, incidentally, occurred because the EPF Board had advised the respondents to withhold remittance under r. 14 until after the decision of the Industrial Court on the status of the appellants.

The respondents calculated interest for the delay period at RM13,535.40, and this was not challenged. Although r. 14 was silent on the question, the respondents decided to bear responsibility for that interest sum and they remitted that sum together with the interest of RM1,973.22 under para. (c), which totalled RM15,508.62, to the EPF Board on 22 December 1983 (pp. 169 and 207 AR), as they did the interest for the delay period and the para. (c) interest in respect of the other appellants.

Thus the respondents remitted to the EPF Board not only all that they were bound to remit by r. 14, but also the interest of RM13,535.40 for the delay period, which r. 14 did not provide for. Subaram was informed of the remittance to the EPF Board of the principal sum of RM33,113.72 and of the interest sum of RM15,508.62 by the company's letter dated 31 December 1983 (p. 167 AR). The total of the two sums was RM48,622.34. The other appellants were likewise informed of the respective positions concerning them.

Now the circumstance that led Subaram to make a claim in the High Court was this. Until the fact that he had ceased to be employed by the company was confirmed by the Industrial Court, the respondents had kept crediting interest on the sum of RM33,113.72 that stood to his credit as at 29 March 1979. There were no further contributions after that date from Subaram or the company because he had ceased to be in the employ of the company, but the respondents kept crediting interest on the principal sum because should the decision of the Industrial Court result in his reinstatement he would be entitled to interest on that sum as if he had not ceased to be in the employ of the company. The continued crediting of interest was, therefore, only provisional. Up to 31 December 1982, with the provisional crediting of interest, the sum of RM33,113.72 had increased to RM197,342.76, so that of that sum RM164,229.04 was provisional interest. Subaram received a statement from the company dated 31 December 1982, which was before the Industrial Court upheld the company's decision,

showing his account in the Fund as standing at RM197.342.76 as at 31 December 1982 (p. 168 AR). The other appellants also would have received a corresponding statement as concerning them. As has been stated, subsequently, on 31 December 1983, the company informed Subaram of the remittance to the EPF Board of sums totalling RM48,622.34, which, as has been seen, settled the respondents' obligations under r. 14.

Almost six years later, on 7 December 1989, solicitors acting for Subaram and nine others, which presumably included the other appellants, wrote to the respondents' solicitors and referred to the statement dated 31 December 1982 in respect of Subaram. Deducting from the sum of RM197,342.76 the sum of RM48,622.34 that had been remitted to the EPF Board, the solicitors enquired why the difference of RM148,720.42 had been withheld. Despite the explanation of the respondents' solicitors as to the true position, Subaram and the other appellants instituted their action in the High Court seeking the declarations that my learned brother, Alauddin JCA, has set out at the beginning of his grounds of judgment and that were, as it was clear to me, sought on the basis that the appellants were entitled to the full amount provisionally shown as standing to their credit as at 31 December 1982 less the amount that the respondents had remitted to the EPF Board in compliance with r. 14.

The appellants either failed or refused to understand the true position of the matter as I have set out. The respondents having remitted to the EPF Board all that they were obliged to by r. 14, and even more than that, nothing more was due in respect of each of the appellants from the respondents. The amount shown as standing to the appellants' credit as at 31 December 1982 (RM197,342.76 for Subaram) on which they based their claim consisted of the principal sum standing to their credit as at 29 March 1979 and provisional interest thereon from that date until 31 December 1982. Had the dispute in the Industrial Court resulted on 8 June 1983 in their being reinstated, they would have been entitled to the provisional interest. As they were not reinstated and as they stood as having ceased to be employed by the company on 29 March 1979, they were not entitled to the provisional interest. They were only entitled at most to the interest that the Fund remitted to the EPF on 22 December 1983.

It was obvious, therefore, that there was no basis for their claim and for that reason I considered that the High Court was right in dismissing it and that their appeal should be dismissed.